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T. C. Memo. 1986-209

UNITED STATES TAX COURT

WILLIAM H. and JEAN A. SWANER, Petitioners
v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 27840-83. Filed May 27, 1986.

Jean A. Swaner, pro se.

Carolyn A. Boyer, for the respondent.

MEMORANDUM OPINION

SWIFT, Judge: This case is presently before the Court on respondent's Motion to Dismiss for Lack of Jurisdiction. The sole issue for decision is whether petitioners timely filed their petition herein as required under section 6213(a).[1]

Petitioners William H. and Jean A. Swaner are husband and wife and resided in Alexandria, Virginia, at the time of filing the petition herein. On June 20, 1983, respondent mailed a

[1] Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as in effect during the year in issue.

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statutory notice of deficiency to petitioners at their last known address in which he determined a deficiency in petitioners' 1980 Federal income tax liability in the amount of $2,861, and an addition to tax under section 6651(a) in the amount of $161.39.

Petitioners filed their petition with this Court on September 26, 1983. The envelope in which their petition was mailed bears a United States postmark dated September 22, 1983, which date is 94 days after the date on which the notice of deficiency was mailed.

In order for a taxpayer to be entitled to litigate in this Court, a petition for redetermination must be filed by the taxpayer within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the proper mailing by the Commissioner of the notice of deficiency. Sec. 6213(a). Under section 7502, a petition is deemed timely filed if the cover or envelope containing the petition bears a United States postmark which falls within the time for filing. Timely filing is an indispensable prerequisite to the jurisdiction of this Court, and failure to timely file will result in the dismissal of the case. Shipley v. Commissioner, 572 F.2d 212 (9th Cir. 1977); Vibro Mfg. Co. v. Commissioner, 312 F.2d 253 (2d Cir. 1963); Estate of Moffat v. Commissioner, 46 T.C. 499 (1966).

Petitioners have admitted that respondent's notice of deficiency was mailed to them at their last known address on June 20, 1983, and that the petition herein was mailed on September 22, 1983, four days after the 90-day period for filing had

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expired. Although petitioners filed with the Court a notice of objection to respondent's motion herein, they alleged therein facts which pertain only to the substantive issues raised in their petition, and they did not present any evidence or arguments with respect to their failure to timely file the petition herein. We have no choice but to grant respondent's motion to dismiss this case for lack of jurisdiction.

An appropriate order will be entered.

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T. C. Memo. 1986-210

UNITED STATES TAX COURT

SHERWOOD W. MATHIS and LaVONNE E. MATHIS, Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

SHERWOOD W. MATHIS, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 1974-79,
12663-80,
16914-80,
25446-81.

Filed May 27, 1986.

Sherwood W. Mathis, pro se.

James J. Everett, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

SHIELDS, Judge: In these consolidated cases, respondent determined deficiencies in petitioners' Federal income taxes as follows:

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Petitioner(s)	Docket No.	Year	Deficiency
Sherwood W. and LaVonne E. Mathis	1974-79	1975	$ 5,303.64
Sherwood W. and LaVonne E. Mathis	12663-80	1976	13,412.00
Sherwood W. Mathis	16914-80	1977	13,547.00
Sherwood W. Mathis	25446-81	1978	5,530.00
		1979	3,603.00

After concessions, the issues remaining for decision are: (1) whether petitioners are entitled to deduct as charitable contributions deposits made during 1975 through 1979 to bank accounts of Full Circle Universal Life Church; (2) whether petitioner, Sherwood W. Mathis (Mathis), is entitled to deduct in 1977, 1978 and 1979 as charitable contributions certain rents due him under a lease which he forgave; and (3) whether petitioner is entitled to a bad debt deduction for the taxable year 1978.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation and exhibits associated therewith are incorporated herein by reference.

Petitioners filed all four of their petitions herein before December 31, 1982, and while they were residents of Iowa. They filed joint income tax returns on the cash basis for the years 1975 and 1976. They also filed an amended joint return on the cash basis for 1975. Mathis filed separate returns on the cash basis for the years 1977, 1978, and 1979. All of the returns were filed with the Kansas City Service Center.

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During 1975 through 1979, Mathis was employed as an electrician. Mrs. Mathis was a housewife. On May 5, 1975, Mathis "was ordained into the ministry" by the Universal Life Church, Inc. Modesto, California. On or about May 19, 1975, he received from Universal Life Church, Inc., Modesto, California what purports to be a charter to start a congregation of the Universal Life Church, Inc. at Sergeant Bluff, Iowa.

On August 30, 1975, Mathis opened both a savings account and a checking account for Full Circle Universal Life Church[1] at the Toy National Bank, Sioux City, Iowa. During the years under consideration Mathis and his wife were the only signatories on each account. However, the employer identification number of the Universal Life Church, Inc., Modesto, California was used on both accounts. During the years 1975 and 1976 petitioners maintained complete control over both accounts. During 1977 through 1979 Mathis alone exercised such control. At various times funds deposited into the accounts were used for the personal inurement of both petitioners.

On their returns for 1975 and 1976, petitioners claimed deductions for charitable contributions in the following total amounts:

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[1] Other names used by petitioners for the "church" were Universal Life Church, Inc. (Full Circle) and simply Full Circle.

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Year	Deduction Claimed
1975	$16,402.00
1976	29,878.00

On his returns for 1977, 1978, and 1979 Mathis claimed deductions for charitable contributions in the following total amounts:

Year	Deduction Claimed
1977	$23,696.00
1978	14,769.00
1979	13,125.00

A portion of the deduction claimed by petitioners for each of the years 1975 through 1979 was represented by funds deposited by petitioners into the checking and savings accounts of Full Circle Universal Life Church.

In 1981, respondent issued an adverse determination letter in which he concluded that Full Circle Universal Life Church was not an organization within the meaning of sections 501(a) and 501(c)(3).[2] Mathis thereafter petitioned this Court for a declaratory judgment with respect to the determination letter and we sustained respondent. Universal Life Church, Inc. (Full Circle) v. Commissioner, 83 T.C. 292 (1984).

During the years 1977, 1978 and 1979, Mathis as lessor leased certain property to Bishop's Attic III, an agency of Catholic Community Resources, Inc., a social service arm of the Roman Catholic Church. For the years 1977, 1978 and 1979, he forgave rental payments due under the lease in the respective

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[2] All section references are to the Internal Revenue Code of 1954, as amended, during the years in issue unless otherwise indicated.

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amounts of $2,100; $9,000; and $9,000. He did not report the forgiven amounts as income, but included such amounts in his deductions for charitable contributions.

In 1972 Mathis as lessor entered into a lease covering real property located in Fairbanks, Alaska. In July 1975 he filed a complaint in the Superior Court for the State of Alaska to recover the past due rent under the lease, in the amount of $7,332. As of the date of trial he had not collected any part of the rent and his attorney had recommended in 1978 that he drop the lawsuit. Even though he had never reported the $7,332 as income, he claimed a bad debt deduction for that amount in 1978. Respondent disallowed the claimed deductions for contributions as well as the bad debt in their entirety.

OPINION

Generally speaking deductions are a matter of legislative grace and petitioners have the burden of proving that they have met all specific requirements. New Colonial Ice Co. v. Helvering, 292 U.S. 435 (1934); Welch v. Helvering, 290 U.S. 111 (1933). These rules apply with equal force to deductions claimed for charitable contributions. Davis v. Commissioner, 81 T.C. 806, 815 (1983), aff'd. without published opinion 767 F.2d 931 (9th Cir. 1985).

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Deposits Made to the Accounts of Full Circle Universal Life Church

At first petitioners contend that their deposits to the accounts of Full Circle Universal Life Church are deductible as contributions to that organization. Even if we assume that the deposits actually constituted contributions, which we are unable to do on this record, petitioners would fail because we have previously sustained respondent's determination that Full Circle Universal Life Church is not an orgaization within the meaning of sections 501(a) and 501(c)(3). Therefore, under section 170 even valid contributions to it are not deductible. Furthermore, we have repeatedly held that the exemption once held by the Universal Life Church of Modesto does not extend to such organizations as Full Circle. Davis v. Commissioner, supra.

Petitioners next contend that the contributions were made to the Universal Life Church, Inc. of Modesto, California, which had tax exempt status prior to its revocation on September 4, 1984. See Universal Life Church, Inc. v United States, 372 F. Supp. 770 (E.D. Cal. 1974); Announcement 84-90, 1984-36 I.R.B. 32 (Sept. 4, 1984). Petitioners, however, have failed to demonstrate that any contribution was made to the Modesto organization. Instead from the record as a whole it is obvious that the funds were deposited into accounts maintained in the name of Full Circle Church over which petitioners had complete control. Consequently, the use of the employer identification number of the Modesto organization on the accounts is meaningless in the absence of any proof that Modesto ever received any of the funds or exercised any control

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over the accounts. In fact, some, if not all, of the monies were used by petitioners for their own inurement. Since petitioners did not relinquish control over the accounts we find no bona fide gift was ever made. Davis v. Commissioner, supra at 817; Seed v. Commissioner, 57 T.C. 265, 275 (1971); DeJong v. Commissioner, 36 T.C. 896, 899 (1961), affd. 309 F.2d 373 (9th Cir. 1962). Therefore, respondent's disallowance of the deductions is sustained.

Forgiven Rents

Mathis claims that he is entitled to deductions for charitable contributions under section 170 for the rents forgiven by him under the lease with Bishop's Attic III. Respondent agrees that rents in the respective amounts of $2,100; $9,000; and $9,000 were forgiven in 1977, 1978 and 1979. He also concedes that the lessee to whom the rents were forgiven qualifies under section 170 to receive tax deductible contributions. Respondent contends, however, that the deductions are not allowable because petitioner, being on the cash basis, never reported any of the forgiven payments as income.

We agree with respondent not only because the deduction is contrary to cash basis accounting, but also because the transaction constitutes a contribution of a partial interest in property for which a deduction is denied under section 170(f)(3), the pertinent portion of which is as follows:

> (3) Denial of deduction in case of certain contributions of partial interests in property.--

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(A) In general.--In the case of a contribution (not made by a transfer in trust) of an interest in property which consists of less than the taxpayer's entire interest in such property, a deduction shall be allowed under this section only to the extent that the value of the interest contributed would be allowable as a deduction under this section if such interest had been transferred in trust. For purposes of this subparagraph, a contribution by a taxpayer of the right to use property shall be treated as a contribution of less than the taxpayer's entire interest in such property.

(B) Exceptions.--Subparagraph (A) shall not apply to--

(i) a contribution of a remainder interest in a personal residence or farm,

(ii) a contribution of an undivided portion of the taxpayer's entire interest in property, and

(iii) a qualified conservation contribution.

Section 1.170A-7(a)(1), Income Tax Regs. provides:

(a) In general. (1) In the case of a charitable contribution, not made by a transfer in trust, of any interest in property which consists of less than the donor's entire interest in such property, no deduction is allowed under section 170 for the value of such interest unless the interest is an interest described in paragraph (b) of this section. See section 170(f)(3)(A). For purposes of this section, a contribution of the right to use property which the donor owns, for example, a rent-free lease, shall be treated as a contribution of less than the taxpayer's entire interest in such property. [Emphasis added.]

Section 1.170A-7(d), Income Tax Regs. further illustrates the application of section 170(b)(3) follows:

(d) Illustrations. The application of this section may be illustrated by the following examples:

Example (1). A, an individual owning a 10-story office building, donates the rent-free use of the top floor of the building for the year 1971 to a charitable

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> organization. Since A's contribution consists of a partial interest to which section 170(f)(3)(A) applies, he is not entitled to a charitable contributions deduction for the contribution of such partial interest. [Emphasis added.]

On this issue, we conclude that Mathis falls squarely within section 170(b)(3) and section 1.170A-7(d)(1), Income Tax Regs. and is not entitled to deduct the forgiven rental payments.

Bad Debt

Mathis agrees that the amount involved in this issue consists of rental payments which were never received or reported by him as income. Therefore, his bad debt deduction for such amounts in 1978 is not allowable because "[w]orthless debts * * * arising from * * * rents, * * * shall not be allowed as a deduction under section 166 unless the income such items represent has been included in the return of income for the year for which the deduction as a bad debt is claimed or for a prior taxable year." Section 1.166-1(e), Income Tax Regs. See also

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Odom v. Commissioner, T.C. Memo. 1979-53, affd. without published opinion 707 F.2d 508 (4th Cir. 1983).

Decisions will be entered under Rule 155.[3]

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[3] In each of the consolidated dockets before us, petitioners have asserted groundless and frivolous arguments not only with respect to the contributions made to the alleged church but also with respect to their alleged beliefs in a constitutional right to a jury trial and their inability to proceed with the case without violating their constitutional privileges under the Fifth Amendment. They have persisted in such tactics even after being advised that their constitutional beliefs were baseless and after unsuccessfully litigating the exempt status of their church. In somewhat similar situations we have imposed damages sua sponte under section 6673. See Witherow v. Commissioner, T.C. Memo. 1985-223; Green v. Commissioner, T.C. Memo. 1985-200. However, in each of these dockets petitioners raised one or more valid issues in addition to their baseless arguments and on some issues have actually succeeded in gaining concessions from respondent. Consequently, we refrain from imposing damages in these cases.

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T. C. Memo. 1986-211

UNITED STATES TAX COURT

ARNOLD N. LEWIS, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 17875-84. Filed May 27, 1986.

John A. Warnick, for the petitioner.

J. A. Lopata, for the respondent.

MEMORANDUM OPINION

SWIFT, Judge: The dispute to be resolved herein concerns the appropriate decision to be entered pursuant to Rule 155,[1] and the primary issue is the timeliness of petitioner's attempt to utilize the income averaging provisions of sections 1301 through 1305 in making the Rule 155 computation.

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1 Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as in effect during the year in issue, and all rule references are to the Tax Court Rules of Practice and Procedure.

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The trial of this case took place on March 19, 1985, in Salt Lake City, Utah. The issue therein was whether certain cash payments made to petitioner from a wholly-owned corporation constituted loans, as petitioner contended, or dividends, as respondent contended. On November 18, 1985, the Court issued its opinion, T.C. Memo. 1985-563, in which it was decided that the cash payments made to petitioner in 1980 constituted dividends. Because of concessions, we directed that the decision be entered under Rule 155.

On July 16, 1985, a related case, Lewis v. Commissioner, docket No. 27849-85, was filed in this Court. That case involves petitioner's 1978 and 1979 Federal tax liabilities, and the primary issue therein also is whether certain payments received by petitioner constituted loans or dividends. The statutory notice of deficiency in that case, dated April 15, 1985, utilizes income averaging pursuant to sections 1301 through 1305 in the computation of the deficiencies determined for 1978 and 1979 and includes a Schedule "G" for both 1978 and 1979 that purports to set forth petitioner's base period income for each of the four years preceding the years in issue therein.[2]

On February 4, 1986, respondent filed his computation for entry of decision under Rule 155. On March 3, 1986, petitioner filed an objection to respondent's computation under Rule 155 and

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[2] The correct application of income averaging necessitates a determination of the correct amount of the average base period income for the four years immediately preceding the year with respect to which income averaging is claimed. See sec. 1302.

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petitioner filed his computation. In his computation, petitioner seeks for the first time to compute his tax liability for 1980 using income averaging under sections 1301 through 1305. Petitioner's proposed computation also includes several miscellaneous differences from respondent's computation, including an increased dividend exclusion (from the $39.00 previously claimed to $200.00), and an increased state sales tax deduction of $127.67. Respondent's computation does not use income averaging, and does not allow for the increased dividend exclusion, nor for the increased state sales tax deduction. Respondent's computation also differs from petitioners in that respondent's figures correct a mathematical error made on petitioner's 1980 Federal income tax return (which results in a $97.14 understatement of petitioner's gross income), whereas petitioner's figures make no such adjustment.

The Court requested that simultaneous supplemental briefs be filed in support of the parties' respective computations. Respondent filed his supplemental brief on April 14, 1986, and petitioner filed his on April 18, 1986.

Rule 155 provides the procedure under which the Court may withhold entry of its decision following the Court's determination of the issues in cases where the amounts of the deficiencies and overpayments are not readily apparent. Rule 155(b) provides that where computations submitted by the parties differ, the Court may in its discretion afford the parties an opportunity to be heard thereon.

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The general rule is that a Rule 155 proceeding may not be used to raise a new issue. Bankers' Pocahontas Coal Co. v. Burnet, 287 U.S. 308 (1932); Estate of Papson v. Commissioner, 74 T.C. 1338, 1340 (1980), and cases cited therein. Rule 155(c) provides:

> (c) **Limit on Argument:** Any argument under this Rule will be confined strictly to consideration of the correct computation of the deficiency, liability, or overpayment resulting from the findings and conclusions made by the Court, and no argument will be heard upon or consideration given to the issues or matters disposed of by the Court's findings and conclusions or to any new issues. This Rule is not to be regarded as affording an opportunity for retrial or reconsideration.

Petitioner, in support of his position that the use of income averaging is merely computational in nature, argues that the use of income averaging is analogous to computations of the appropriate deductions for medical expenses, the appropriate percentage limitations on charitable contributions, and the question of whether the use of itemized deductions would result in a lower tax liability than the use of the standard deduction. Petitioner points out that this Court has allowed such computations to be made under Rule 50, the forerunner to Rule 155. See Lustman v. Commissioner, T.C. Memo. 1960-116 (medical expenses); Quinlan v. Commissioner, T.C. Memo. 1957-147 (itemized deductions versus standard deduction); and Zimmermann v. Commissioner, 36 B.T.A. 618 (1937) (charitable contributions limitation). Petitioner also argues that proof of petitioner's base period income during the years 1976 and 1977, which is

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necessary for an income averaging computation, may be found in the statutory notice of deficiency issued in the related case of Lewis v. Commissioner, docket No. 27849-85, and that petitioner's returns as filed for 1978 and 1979 should be regarded as correct for purposes of the Rule 155 computation. Petitioner argues that in the event there is a judicial determination of a deficiency for 1978 or 1979, respondent need only bring a motion at that time to revise the judgment herein.

Respondent takes the position that petitioner's attempt to utilize income averaging in the context of a Rule 155 computation constitutes the raising of a new issue, which should not be allowed. Respondent emphasizes that the issue of income averaging was not raised in the pleadings, nor was it placed before the Court at any time prior to the submission of the Rule 155 computations of the parties. Respondent also points out that evidence of petitioner's base period income never has been introduced into evidence in this case.

Respondent relies primarily on Cloes v. Commissioner, 79 T.C. 933 (1982). In that case, the taxpayers sought to amend their pleadings and to raise the issue of their eligibility for income averaging for the first time as part of the Rule 155 computation. The issue had not been raised in the pleadings and the taxable income in the base period years was not contained in the record. We held in Cloes that, under the circumstances of that case, the attempt to use income averaging for the first time in the context of a Rule 155 computation constituted an attempt

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to raise a new issue. In reaching that conclusion, we noted that "[i]n those cases where a late claim of income averaging has been permitted, the record contained all of the evidence necessary to making such computation and the issue was raised no later than at the trial." 79 T.C. at 935.

Cloes is directly on point and is controlling. The evidence necessary to compute the appropriate deficiency utilizing the income averaging provisions is not contained in the record herein. The correct taxable income for the two years immediately prior to the year in issue (namely, 1978 and 1979) is currently being litigated before this Court in another case, and cannot be determined until a final resolution of that case is reached.

We recognize that we have allowed a taxpayer to elect income averaging as late as the time of trial. See Hosking v. Commissioner, 62 T.C. 635 (1974). In Pereira v. Commissioner, T.C. Memo. 1976-66, the taxpayers attempted to raise the issue of income averaging for the first time after entry of the decision. In denying such a request, we noted:

> Petitioners completely failed to raise the issue of income averaging as an element of their claim for relief from this Court. * * * Unlike Hosking, the Court decided these cases without the slightest knowledge that any such issue was lurking in the background. In addition, the record lacks any data which would have enabled the Court to apply income averaging here even if it had been disposed to do so at the time the final decisions were entered. [35 T.C.M. 290, 292; 45 P-H Memo T.C. par. 76,066 at 76-287.]

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It is too late for petitioner to raise the issue of income averaging at this stage of the proceedings. Proper judicial administration requires that there be an end to litigation and that bifurcated trials be avoided. Cloes v. Commissioner, 79 T.C. 933, 937 (1982).

We therefore conclude that petitioner may not utilize the income averaging provisions in the context of the Rule 155 computations herein. Respondent has conceded on brief the increased dividend exclusion and the increased sales tax deduction. Petitioner has not addressed the issue of the mathematical error that was made on petitioner's 1980 return (which return is in evidence herein) and corrected in respondent's computation. The correction of a mathematical error is appropriate as part of a Rule 155 computation. Delatour Beverage Corp. v. Commissioner, 12 B.T.A. 412 (1928). We direct that such a correction is to be made.

Accordingly,

Decision will be entered under Rule 155 in accordance with respondent's revised computation.

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